

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRUCE A. COOPER	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
JAMES PRICE, et al.	:	
Respondents.	:	No. 98-3009

**MEMORANDUM AND ORDER**

**J. M. KELLY, J.**

**NOVEMBER , 2002**

Presently before this Court is a Petition for Immediate Reconsideration filed by the District Attorney of Philadelphia County, on behalf of itself, Warden James Price and the Attorney General of the Commonwealth of Pennsylvania (collectively, the "Respondents") (Doc. No. 50), requesting that this court vacate its amended order of October 16, 2002 issuing a certificate of appealability ("COA") to Petitioner Bruce A. Cooper ("Petitioner"). Petitioner filed a Memorandum Regarding Certificate of Appealability (Doc. No. 51) in response, and Respondents replied thereto (Doc. No. 52).<sup>1</sup>

On October 2, 2002, this Court issued a Memorandum and Order

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<sup>1</sup> On November 4, 2002, our chambers received a letter from Respondents in response to Petitioner's October 29, 2002 Memorandum Regarding Certificate of Appealability. The letter indicates that a copy was delivered to Petitioner's counsel, but it does not appear from the Court's docket or the letter itself that Respondents actually filed the letter with the Clerk of Court. As no harm or prejudice has resulted to the parties and the Court benefits from full briefing of the matter, this Court will file Respondents' letter with the Clerk of Court and consider it in disposing of the instant Petition.

denying Petitioner's petition for writ of habeas corpus as untimely filed and not subject to equitable tolling, without reaching the merits of Petitioner's claims. On October 16, 2002, this Court amended its Memorandum and Order to state that a COA shall issue. Respondents contend that since this Court's Memorandum and Order failed to indicate that Petitioner made a substantial showing that he was denied a constitutional right, as literally required by 28 U.S.C. § 2253(c), that this Court should vacate its October 16, 2002 order issuing Petitioner's COA.

Pursuant to §2253(c), a COA may be issued to a habeas petitioner in accordance with the following requirements:

- (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
  - (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
  - (B) the final order in a proceeding under section 2255.
- (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
- (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c).<sup>2</sup> The United States Supreme Court also

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<sup>2</sup> Local Appellate Rule 22.2 of the Rules of the United States Court of Appeals for the Third Circuit requires that at the time a final order denying a habeas petition is issued, the district judge shall make a determination as to whether a COA

instructs that a COA should issue when the district court denies a habeas petition on procedural grounds, without reaching the prisoner's underlying constitutional claim, and two conditions are met:

that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000).

As discussed above, this Court denied Petitioner's habeas petition on procedural grounds, without reaching the merits of Petitioner's underlying constitutional claim, the very situation addressed in Slack. As to the Supreme Court's two-part test, this Court has determined that: first, reasonable jurists would find it debatable whether Petitioner states a valid claim that he received ineffective assistance of counsel in violation of the Sixth Amendment; and, second, that reasonable jurists would find it debatable whether this Court's procedural ruling was correctly decided.

In accordance with the statutory requirements of § 2253(c), which this Court will explicitly provide below, and the two-part test set forth by the Supreme Court, it is ordered that Respondents' Petition For Immediate Reconsideration requesting that this court vacate its October 16, 2002 order issuing a COA

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should issue. 3d Cir. R. 22.2.

to Petitioner is **DENIED**. It is further ordered that this Court's October 16, 2002 order shall be amended to comply with the literal requirements of 28 U.S.C. § 2253(c) as follows:

Petitioner has made a substantial showing of the denial of a constitutional right by stating a claim that counsel rendered ineffective assistance in violation of the Sixth Amendment by failing to present a competent defense.

BY THE COURT:

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JAMES MCGIRR KELLY, J.